
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D C.

DATE: July 9, 1990
CASE NO. 88-ERA-31

IN THE MATTER OF

JOHN R. BRYANT,
COMPLAINANT,

v.

EBASCO SERVICES, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

Before me for review is the [Recommended] Order of Dismissal (R.O.) [1] of Administrative Law Judge (ALJ) James W. Kerr, Jr., issued on March 15, 1989, in this case which arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982). The ALJ granted Respondent's Motion for Summary Decision requesting dismissal of this case. The parties were afforded an opportunity to file briefs in support of or in opposition to the ALJ's decision. Respondent filed a letter indicating that its Motion for Summary Decision below stated Respondent's position in support of the ALJ's decision. Complainant did not submit a brief before the Secretary.

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BACKGROUND

Complainant worked for Respondent, Ebasco Services, Inc. (Ebasco), as a quality control inspector at the South Texas Project (STP) until he was terminated on January 9, 1987. Both parties agree that, thereafter, Complainant filed a timely ERA complaint with

the Department of Labor (DOL) against Respondent, alleging retaliatory discharge from STP due to Complainant's protected activity (refusal to approve improper welding). Before reaching the hearing stage, that complaint apparently was settled by an oral agreement, but the terms of the agreement are unclear on the present record.[2]

The instant case arises from Complainant's letter to DOL, dated January 11, 1988, which was treated as a new complaint. Complainant claims that Respondent violated the terms of the prior agreement by refusing to rehire Complainant, because "reemployment at a comparable position was an integral term of the settlement . . . . " Complainant's Brief in opposition to Respondent's Motion for Summary Decision (before the ALJ) (Complainant's Brief) at 2. Complainant also alleges ongoing retaliatory refusal to hire and blacklisting because of his prior ERA complaint against Respondent.

Respondent filed a Motion for Summary Decision contending that Complainant's admitted lack of a high school diploma or General Education Development (GED) equivalency at the time of application precludes Complainant from establishing a requisite element of his prima facie case, *i.e.* that he was qualified for positions which Respondent sought to fill. Respondent contends that these educational qualifications are required for reemployment as a quality control inspector.[3]

After a limited hearing on Respondent's motion, the ALJ allowed the parties to conduct discovery and to file briefs on the issues of whether the ALJ had the authority to enforce a prior agreement and whether Complainant's admitted lack of a high school diploma is dispositive. Complainant opposed Respondent's motion with an affidavit. Although Complainant concedes that he lacks a high school diploma or GED equivalency, Hearing Transcript of January 24, 1989 (T.), at 13; Complainant's Answers to First Set of Interrogatories (Exhibit 4 to Respondent's Motion) (Complainant's Answers) at 4, he argues that other factual disputes must be resolved in deciding this case and that a summary decision is not appropriate. Complainant asserts that the high school diploma issue is not dispositive because

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complainant sought "any comparable position" and applied for numerous positions with Respondent outside of quality control, for which he was qualified. Alternatively, Complainant challenges Respondent's assertion that the cited Nuclear Regulatory Commission (NRC) guidelines are mandatory "requirements" as opposed to "recommendations." The ALJ's order stated, without elaboration: "[a]fter having reviewed the arguments of the parties, the Court is of the opinion that Claimant's lack of a high school diploma or equivalency is dispositive of this case."

DISCUSSION

Because I find that Complainant has raised material issues of fact which the ALJ's conclusory dismissal did not address, this case will be remanded.

I recognize that pursuant to the DOL regulations and the developed case law, the non-moving party cannot defeat a supported motion for summary judgment by resting on allegations or denials. 29 C.F.R. § 18.40(c) (1989); *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). Moreover, the non-moving party cannot defeat a notion for summary judgment if the evidence presented, if accepted as true, does not support a rational inference that the substantive evidentiary burden of proof could be met. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-252 (1986); *Helmstetter v. Pacific Gas & Electric Co.*, Case No. 86-SWD-2, sec. Decision and Order of Remand, June 15, 1989, slip op. at 9.

Respondent's motion is based on the underlying premise that complainant seeks reinstatement to his former position as a quality control inspector within the nuclear industry, and that the requisite qualifications established for these positions are regulated by the NRC. To the extent that Complainant seeks reinstatement to his former position as a quality control inspector at a nuclear power plant, the ALJ correctly concluded that Complainant's admitted lack of a high school diploma or GED equivalency is dispositive. Respondent has proferred evidence establishing its policy of compliance with the NRC Regulatory Guide 1.58, Revision 1, September, 1980, entitled "Qualification of Nuclear Power Plant Inspection, Examination and Testing Personnel." *See* Affidavit of Thomas C. Brandt, dated March 25, 1989 (Exhibit 3 to Respondent's Motion); Exhibits 1 and 2 to Respondent's Motion; Abel deposition at 25-27, 84-95. These

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guidelines are applicable in the hiring of quality control personnel at nuclear construction projects and provide in pertinent part that, "the candidate should be a high school graduate or have earned the General Education Development equivalent to a high school diploma." Complainant admittedly does not satisfy these educational requirements and has not presented any evidence to refute Respondent's showing that Respondent consistently follows this guideline at nuclear projects.[4] Consequently, Complainant cannot make a prima facie case of discriminatory refusal to rehire or hire with respect to these quality control positions, because he cannot show that he has the educational qualifications required for these jobs with Respondent. Accordingly, this allegation of the complaint is denied.

The ALJ did not address Complainant's additional allegation that he applied for jobs with Respondent which do not require a high school diploma or GED equivalency and for which he was qualified. Complainant proffered evidence to support his contention that he sought any "comparable position" with Respondent for which he was qualified and not simply reinstatement to his former position as a quality control inspector. *See* Perez letter dated October 30, 1987 (Exhibit F to Abel deposition); Perez "Narrative" and "Recommendation" dated April 10, 1987 (Exhibit B to Abel deposition); Resume dated January 1987 (Exhibit H to Abel deposition); complainant's Affidavit (Exhibit 7 to Complainant's Brief); Abel deposition at 70-73. The ALJ did not indicate whether this

evidence was considered, and he failed to discuss the effect, if any, of the alleged reemployment terms of the prior settlement agreement.

Neither was Complainant's allegation of blacklisting by Respondent addressed. Complainant alleged that "bad paper" rumors were being spread by Respondent's personnel, Complainant's letter to Mr. Brown, Wage and Hour Division, dated January 11, 1988, at 1, 4, and Complainant has submitted evidence which, if accepted as true, would satisfy his burden of establishing a prima facie case of blacklisting against Respondent. Complainant's Affidavit (Exhibit 7 to Complainant's Brief) at 2-3, No. 15; Abel deposition at 79-83.

Consequently, Complainant's allegations of blacklisting and retaliatory refusal to rehire or hire in a non-quality control position, must be decided. I conclude, therefore, that this case must be remanded to the ALJ for an evidentiary hearing on these allegations. In remanding this case, I reach no conclusions, nor

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should any be inferred, as to the merits of these allegations.

ORDER

Accordingly, this case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The ALJ's Order is not entitled a "Recommended Order. Under the regulations implementing the ERA, however, an ALJ's decision is only a recommended decision except in limited circumstances. see 29 C.F.R. § 24.5(e)(4) (1989). Final orders are issued by the Secretary. 29 C.F.R. § 24.6.

[2] The record includes a "Release," signed by Complainant and the DOL compliance officer on April 10, 1987, in settlement of the earlier complaint, but the Release does not specify any terms agreed upon by the parties. Because of factual questions concerning this prior complaint and its resolution, any issue now raised by Complainant concerning the enforcement of the alleged terms of the prior agreement cannot be resolved in this

decision. The relevant allegations concerning the earlier complaint will be considered, however, as part of the factual situation leading to the instant complaint.

[3] Respondent apparently was misled concerning Complainant's education when Respondent employed him previously as a quality control inspector. *See* Able deposition at 84-93, Exhibits B, I and J.

[4] I need not decide whether the guideline is a "requirement" or "recommendation" since Respondent has demonstrated its adoption and consistent use of the guideline.